(9)

No. 92-466

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

LIGGETT GROUP, INC.,
now named Brooke Group Ltd.,
Petitioner,
v.
BROWN & WILLIAMSON TOBACCO CORPORATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR THE BUSINESS ROUNDTABLE AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

THOMAS B. LEARY *
MARGARET F. COSTELLA
HOGAN & HARTSON
Columbia Square
555 Thirteenth Street, N.W.
Washington, D.C. 20004-1109
(202) 637-5600

Of Counsel
RICHARD REA
Barley Mill Plaza
P.O. Box 80036
Wilmington, Delaware 19880-0036

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF AMICUS CURIAE	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
I. THE IMPORTANCE OF THE CASE	3
II. THE FARFETCHED NATURE OF THE CLAIM	4
III. THE NEED FOR OBJECTIVE STANDARDS	6
IV. PRACTICAL CONSIDERATIONS	7
CONCLUSION	10

TABLE OF AUTHORITIES

Cases Page

A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc., 881 F.2d 1396 (7th Cir. 1989), *cert. denied*, 494 U.S. 1019 (1990) 3, 9
Adjusters Replace-A-Car, Inc. v. Agency Rent-A-Car, Inc., 735 F.2d 884 (5th Cir. 1984), *cert. denied*, 469 U.S. 1160 (1985) 8
Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d 227 (1st Cir. 1983) 7, 8
Columbia Nitrogen Corp. v. Royster Co., 451 F.2d 3 (4th Cir. 1971) 6
Conoco, Inc. v. Inman Oil Co., 774 F.2d 895 (8th Cir. 1985) 7
Henry v. Chloride, Inc., 809 F.2d 1334 (8th Cir. 1987) 7, 8
Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977) 7
Irvin Indus., Inc., v. Goodyear Aerospace Corp., 974 F.2d 241 (2nd Cir. 1992) 8
Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986) 4, 6-9
McGahee v. N. Propane Gas Co., 858 F.2d 1487 (11th Cir. 1988), *cert. denied*, 490 U.S. 1084 (1989) 8
MCI Communications Corp. v. Am. Tel & Tel. Co., 708 F.2d 1081 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983) 8
O. Hommel Co. v. Ferro Corp., 659 F.2d 340 (3rd Cir. 1981) 7
Perma Life Mufflers, Inc. v. Int'l Parts Corp., 392 U.S. 134 (1968) 5
United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940) 8
William Inglis & Sons Baking Co. v. ITT Continental Baking Co., 668 F.2d 1014 (9th Cir. 1981), *cert. denied*, 459 U.S. 825 (1982) 3

Statutes

Robinson-Patman Act § 2(a), 15 U.S.C. § 13(a) 3
Sherman Act § 2, 15 U.S.C. § 2 3

TABLE OF AUTHORITIES—Continued

Other Authorities Page

P. Areeda & H. Hovenkamp, ANTITRUST LAW ¶¶ 710-21, 714.1b, 720'c (1992 Supp.) 3, 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-466

LIGGETT GROUP, INC.,
now named Brooke Group Ltd.,
Petitioner,

v.

BROWN & WILLIAMSON TOBACCO CORPORATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF FOR THE BUSINESS ROUNDTABLE AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

INTEREST OF AMICUS CURIAE

The Business Roundtable is an association of about 200 member companies represented by their chief executive officers. The members are substantial companies engaged in a wide variety of businesses, and they face intense competition from domestic and foreign rivals. They therefore have a critical interest in the standards that are applied to judge the legality of aggressive competition in the marketplace.[1]

Because both parties are represented by eminent counsel, and because it is likely that other briefs *amici* will be

---

[1] Pursuant to Rule 37.3 of the Rules of the Supreme Court, this brief is filed with the consent of both parties. Copies of the consent letters are filed herewith.

filed, The Business Roundtable will not burden this Court with arguments that merely restate those made elsewhere. It is also assumed that the basic facts will be set forth in the principal briefs. This brief will simply present the perspective of substantial companies that may be particularly vulnerable to claims of predation brought by competitors who are uncomfortable with vigorous competition.

SUMMARY OF ARGUMENT

This case is important because the Court's decision will have a substantial impact on the standards applied in predatory pricing claims under the Sherman Act, as well as discriminatory pricing claims under the Robinson-Patman Act. It is difficult to draw a line between predatory conduct, prohibited by law, and aggressive pricing competition, which the law encourages. There is serious risk that procompetitive conduct will be deterred if it is too easy for competitors who are uncomfortable with competition to assert predatory pricing claims.

One way to screen out inappropriate claims of predatory pricing is to demand proof that the immediate low prices, which hurt particular competitors, can reasonably be expected to result in higher prices, which hurt consumers. The plaintiff should be required to construct a plausible scenario of ultimate competitive harm. And that scenario should be judged by objective standards because an organization with multiple actors is likely to memorialize any number of hypothetical scenarios and to have conflicting expressions of intent.

The scenario of competitive harm in this case is the most strained and farfetched that has ever been asserted in litigation. Moreover, the postulated harm could never materialize without the active cooperation of the plaintiff. The unique character of the claims here does not diminish the concerns of the business community—it heightens them. If this plaintiff can reach a jury on the hypothetical scenario presented in this case, almost any

scenario will be adequate to support a claim. Aggressive price competition will inevitably be chilled.

Companies that contemplate aggressive, procompetitive action generally cannot take the time to pursue a full, internal inquiry into all the arguments that might someday be advanced in a lawsuit. They need to rely on the assumption that they can price aggressively if there is no reasonable likelihood that competition will be harmed.

ARGUMENT

I. THE IMPORTANCE OF THE CASE

Petitioner in this case asserts "primary line" injury under Section 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a). The standards applied in this case, however, will also have an impact on predatory pricing claims under Section 2 of the Sherman Act, 15 U.S.C. § 2, because there is a growing tendency to recognize that the two statutes should be interpreted in a consistent way. *See A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc.*, 881 F.2d 1396, 1399, 1404 (7th Cir. 1989), *cert. denied*, 494 U.S. 1019 (1990); *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014, 1042 (9th Cir. 1981), *cert. denied*, 459 U.S. 825 (1982). A leading treatise summarizes the congruity between the two statutes in this area as follows:

> [B]oth statutes require the identification of an improper price and the distinction between unjustified and justified pricing. There is really only a single analytical process for doing so. This is not to claim an undisputed definition of improper pricing. But whatever one's definition of pro-competitive or anticompetitive pricing may be, it does not vary with the statutory words.

P. Areeda & H. Hovenkamp, ANTITRUST LAW ¶ 720'c (1992 Supp.). This case, therefore, is not just a narrow controversy under the Robinson-Patman Act; it can have

a sweeping effect on the law applied to unilateral business conduct.

II. THE FARFETCHED NATURE OF THE CLAIM

It is difficult to distinguish "unjustified" and "justified" pricing, but it is important to draw the line intelligently lest aggressive price competition be discouraged. Low prices, which may be challenged as discriminatory or predatory, confer an immediate and sure benefit on consumers. The claim that they may lead to higher prices, which could harm consumers down the road, involves speculation about the future. If this speculation is not based on rational inferences, consumers will suffer in the present based on unwarranted fears about the future.

The archetypal predatory pricing claim presents a relatively straightforward scenario. A dominant competitor cuts prices to drive all or most of its rivals out of business, thereby achieves some degree of monopoly power, and then exploits that power to recoup its losses by charging monopoly prices.

The scenario is easy to describe, but extraordinarily difficult to achieve. This Court has expressed a well-justified skepticism that even this relatively straightforward sequence is likely to play out in the real world. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

Now consider the scenario that Liggett proposes in support of its claim of competitive injury in this case. Brown & Williamson ("B&W") did not have a dominant position in the so-called "generic" cigarette business; Liggett did. B&W was a new entrant. Liggett does not claim that B&W was trying to drive Liggett out of the business; the claim rather is that the new entrant B&W could somehow intimidate the dominant competitor Liggett into yielding price leadership to B&W, so that B&W could drive all prices in the generic business to supra-competitive levels.

The scenario does not end here. Liggett further claims that B&W contemplated that these supra-competitive prices in the generic cigarette business would reduce price pressures on the branded segment of the business. B&W does not have a dominant position in the branded segment of the business either, but supposedly could rely on "oligopolistic" behavior by its rivals to raise prices to supra-competitive levels in that segment as well. *See Petition for a Writ of Certiorari* at 4-8.

This is an incredibly farfetched scenario for a number of reasons. First, it depends on the assumption that a new entrant into a business can intimate an existing near-monopolist, which also happens to have a deep pocket. Second, it depends on the assumption that the intimidated near-monopolist will eventually be induced to maintain supra-competitive prices. And, third, it depends on the assumption that collection of different rivals in another segment of the business will react to these supra-competitive prices by charging supra-competitive prices themselves. If any one of these assumptions fails, B&W's "investment" in the low prices complained of will be in vain.

Note also that if this complex scenario were to become real, Liggett would benefit as much as anyone else. Liggett is not a small competitor that has been squashed by predatory conduct; it continues to be a strong factor in its chosen segment of the business. Prices in the generic segment are either supra-competitive or they are not. If they are not, there has been no competitive harm; if they are, Liggett has been a principal, if not the principal beneficiary.

It is one thing to hold, as this Court has done,[2] that *in pari delicto* is no defense when the parties are unequal in bargaining power and the competitive harm has materialized. It is quite another thing to approve a theory,

[2] *Perma Life Mufflers, Inc. v. Int'l Parts Corp.*, 392 U.S. 134 (1968).

of incipient injury where the hypothetical harm can only result from the continued cooperation of an equally powerful complaining party. *Cf. Columbia Nitrogen Corp. v. Royster Co.*, 451 F.2d 3, 15-16 (4th Cir. 1971) ("when parties of substantially equal economic strength . . . bear equal responsibility for the consequent restraint of trade, each is barred from seeking treble damages from the other").

It could be argued that the unique, indeed bizarre, scenario of competitive harm advanced in this case means that a decision cannot have any general application and that the concerns of The Business Roundtable, and of other *amici*, are groundless. Quite the opposite is true. If the farfetched scenario advanced in this case can survive summary disposition, almost any scenario can. This means that companies with modest market positions, and no reasonable prospect of monopoly power, will still have to be concerned about claims of predation—even from competitors who are more powerful.

III. THE NEED FOR OBJECTIVE STANDARDS

The law is not concerned with low prices in themselves, but rather with the possibility of "later monopoly profits" [3] that may be the ultimate result. *Matsushita*, therefore, requires a plaintiff to demontsrate that there is a rational expectation that competitive harm will flow from the low prices complained of. Business enterprises need to be assured that they can safely price aggressively if there is no likely scenario of competitive harm.

A scenario does not become likely just because someone in a business enterprise has speculated about it. In large organizations like those who are members of The Business Roundtable there are many, many people who make proposals for action and purport to predict the future. This kind of speculation is encouraged, not discouraged, because the competition for ideas is important inside a business, just as it is in the community at large. It is neither feasible nor practical to censor writings in advance, nor to seek out and destroy maverick internal communications, in order to ensure nothing remains that is inaccurate or of potential comfort to a future adversary.

[3] *Matsushita*, 475 U.S. at 588-89.

For this reason, claims of competitive harm need to be evaluated by objective standards. The "intent" of a large organization is an artificial concept in any event, and competitive harm does not become plausible, within the meaning of *Matsushita*, just because someone in the organization says it is plausible.

Lower courts have come to recognize the "hazards of using evidence of desire to prevail competitively to forecast economic harm. '[E]ven in the presence of direct evidence of intent, we think a separate showing of predatory or anticompetitive conduct is necessary. Evidence of intent alone can be ambiguous or misleading.'" *Henry v. Chloride, Inc.*, 809 F.2d 1334, 1344 (8th Cir. 1987) (citing *Conoco, Inc. v. Inman Oil Co.*, 774 F.2d 895, 904 n.6 (8th Cir. 1985). *See also Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227 (1st Cir. 1983); *O. Hommel Co. v. Ferro Corp.*, 659 F.2d 340 (3rd Cir. 1981).

IV. PRACTICAL CONSIDERATIONS

Rules of decision in antitrust cases have to be *practical*. They must be capable of application in manageable trials,[4] and they also must be capable of reasonable application by business people in the heat of competitive battle. There are costs and burdens associated with internal law compliance, as well as costs and burdens associated with external law enforcement. Sound rules of *per se* illegality are practical in both arenas: they not only facilitate the trial of cases, but also help business people to make decisions. It is relatively easy, for example, to advise that price-fixing is illegal—regardless of whether the prices are reasonable. But it is equally important to know that

[4] *Cf. Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977).

some things are *per se* legal or nearly so. Otherwise, business decisions can be stalled indefinitely.

Competitive pricing is the "central nervous system" of a free-market economy, *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940), and fast responses are imperative. It is not practical for a competitive business that needs to make price decisions quickly in the marketplace to delay until it has undertaken a full-fledged economic inquiry or a sweep of company files for damaging material. Competitive businesses need to act on the basis of roughcut rules of decision.

This is the reason why objective, cost-based standards are important for determining whether prices are "predatory" in the first place. "It cannot be the purpose of the antitrust laws to force efficient firms to hold a 'price umbrella' over their less efficient or less aggressive rivals." P. Areeda & H. Hovenkamp, ANTITRUST LAW ¶¶ 710-21, 714.1b (1992 Supp.)[5] And it also is the reason why it is important to demand, as *Matsushita* does, that there be some plausible scenario to explain how even "predatory" prices are likely to cause competitive harm. As this Court said in *Matsushita*, "[w]e must be concerned lest a rule or precedent that authorizes a search for a particular type of undesirable pricing behavior end up by discouraging legitimate price competition." 475 U.S. at 594.

[5] A majority of circuits have adopted an objective, cost-based standard that provides businesses with a safe harbor of sorts—the "Areeda-Turner" test. This test presumes that prices above short-run marginal cost cannot be predatory. *See, e.g., Irvin Indus., Inc. v. Goodyear Aerospace Corp.*, 974 F.2d 241 (2nd Cir. 1992); *Henry v. Chloride, Inc.*, 809 F.2d 1334 (8th Cir. 1987); *Adjusters Replace-A-Car, Inc. v. Agency Rent-A-Car, Inc.*, 735 F.2d 884 (5th Cir. 1984), *cert. denied*, 469 U.S. 1160 (1985); *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227 (1st Cir. 1983); *MCI Communications Corp. v. Am. Tel. & Tel. Co.*, 708 F.2d 1081 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983). Nonetheless, other circuits have applied different standards. *See, e.g., McGahee v. N. Propane Gas Co.*, 858 F.2d 1487 (11th Cir. 1988), *cert. denied*, 490 U.S. 1084 (1989).

There is nothing more discouraging than the thought of an antitrust lawsuit—particularly one that cannot be resolved summarily. The Court might consider the message that the larger business community will receive if this case holds that a company risks an antitrust trial because of an aggressive attack on a near-monopolist in its own backyard, when there is no potential for competitive harm absent the active cooperation of the near-monopolist itself. If this case presents jury issues, there are myriad less fanciful hypotheticals that competitors could employ to discourage price competition.

In addition, for predatory pricing to make sense, there must be substantial evidence that the alleged predator can recoup its losses at some future point. As this Court wrote in *Matsushita*, "[t]he success of any predatory scheme depends on *maintaining* monopoly power for long enough both to recoup the predator's losses and to harvest some additional gain." 475 U.S. at 589 (emphasis in original). In most cases, this can occur only if the monopoly prices do not attract new entry; "without barriers to entry it would presumably be impossible to maintain supracompetitive prices for an extended time." *Matsushita*, 475 U.S. at 591 n.15. *Accord, e.g., A. A. Poultry Farms, Inc. v. Rose Acre Farms, Inc.*, 881 F.2d 1396 (7th Cir. 1989), *cert. denied*, 494 U.S. 1019 (1990). The Court should confirm that a dangerous probability that losses can be recouped is essential for liability.

In this case, B&W simply could not have rationally expected to recoup its losses. As a brand new entrant into the generic business, it could not assume that the dominant company, Liggett, could be induced to charge supra-competitive prices. And even if Liggett did, B&W—with a mere 12% of the relevant market for branded cigarettes—could not be sure that its larger competitors would also charge supra-competitive prices.

In fact, the farfetched scenario that Liggett postulates did not materialize. What actually happened was that B&W's competitors easily expanded their product lines to include generic cigarettes and the market for generics grew from 2.8 billion cigarettes in 1981 to nearly 80 billion in 1989.

CONCLUSION

Petitioners have urged that there are special facts which would justify a reversal in this case, and that reliance on these facts would help to contain the impact of such a decision. The Business Roundtable has not scrutinized the full record and therefore cannot express any views on disputed issues of fact. Moreover, neither party is a member, and The Business Roundtable has no special interest in the individual fortunes of either company.

The Business Roundtable is, however, vitally interested in the legal principles that will be established in this case. It is very difficult for this Court to issue an opinion that does not have an effect far beyond the case at hand. Despite the most careful language of limitation in an opinion business counselors are bound to attach significance to the decision in this case—as indeed they already attach significance, rightly or wrongly, to the fact that it has been accepted for review. There is a real risk that aggressive price competition in a large segment of the business world will be chilled if this Court's decision broadly expands the universe of companies that have to be concerned about claims of predation.

The Business Roundtable urges the Court to reaffirm the principles set forth in *Matsushita* and to emphasize once again that an antitrust plaintiff must present a plausible scenario of competitive harm in order to sustain a predatory pricing claim.

Respectfully submitted,

Thomas B. Leary *
Margaret F. Costella
Hogan & Hartson
Columbia Square
555 Thirteenth Street, N.W.
Washington, D.C. 20004-1109
(202) 637-5600

Of Counsel
Richard Rea
Barley Mill Plaza
P.O. Box 80036
Wilmington, Delaware 19880-0036

* **Counsel of Record**